

NTCA Petition for Rulemaking  
July 26, 2002

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## SUMMARY

NTCA's petition for rulemaking seeks to close a loophole in the Commission's rules that, unless closed, will jeopardize the preservation and advancement of universal service in high-cost areas in America. As a result of this loophole, the public will pay tens of millions of dollars in duplicative universal service support over the next quarter and hundreds of million of dollars over the next several quarters.

Commission rules provide support to competitors who provide the "federally supported" services and are designated eligible telecommunications carriers (ETCs). These competitive ETCs (CETCs) are currently receiving support for service to customers who already receive the "federally supported" services from their incumbent local exchange carriers (ILECs). Because the rules do not clearly define what is a "captured" or "new" subscriber line, multiple CETCs are using this lack of definition to receive support for every customer they subscribe. As a result, high-cost support has grown exponentially from \$4.6 million in the first quarter of 2001 to \$76.4 million in the third quarter of 2002. This rapid growth in high-cost support will be aggravated further as more and more carriers apply for support. An expedited rulemaking is needed to prevent the erosion of universal service by closing this loophole that is the result of a lack of definition for "captured" and "new" customers.

Congress and the Commission never intended for CETCs to receive support for lines already served by the incumbent. When the Commission adopted rules for distributing universal service support in 1997, it said that it intended to provide a CETC support when an ILEC customer discontinued its ILEC service and replaced it with CETC service. This has not

happened and the existing state of affairs is not in the public interest.

The Commission therefore should adopt NTCA’s proposed definitions of “captured” and “new” subscriber lines, and a Duplicative Support Prevention Rule to ensure that when a customer receives service from one or more eligible carriers, the carrier that provides service first receives the support until it is displaced. The adoption of the proposed definitions and rule will ensure the Commission’s intent and will minimize, if not eliminate, the impending public waste that would otherwise occur while the Commission plans its broader rulemaking on portability over the next several months. The expeditious adoption of the proposed interim safeguards will ensure the survival of universal service in the long run by preserving the future viability of adequate, affordable and advanced telecommunications services in hard to serve rural, high-cost, and insular areas in the United States.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )

Petition for Rulemaking to Define “Captured” )  
and “New” Subscriber Lines For Purposes of )  
Receiving Universal Service Support, )  
Pursuant to 47 C.F.R. § 54.307 *et seq.* )

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**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
PETITION FOR EXPEDITED RULEMAKING**

The National Telecommunications Cooperative Association<sup>1</sup> (NTCA), pursuant to Section 1.401 of the Federal Communications Commission’s (Commission or FCC) rules, hereby petitions the Commission to initiate an expedited rulemaking to adopt safeguards that will prevent further harm to the preservation and maintenance of universal service.

The Commission needs to implement safeguards expeditiously to prevent the growing public waste of tens of millions of dollars in duplicative universal service support dollars over the next quarter alone and hundreds of millions over the next several quarters. Specifically, the Commission should close a loophole in its rules by adopting and incorporating NTCA’s proposed definitions of “captured” and “new” subscriber lines and Duplicative Support Prevention Rule in its existing rules for establishing when a competitive eligible

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 550 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members also provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended (Act). And all of NTCA’s members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

telecommunications carrier (CETC) can receive support for a subscriber. The adoption of NTCA's proposed definitions and rule will minimize, if not eliminate, the impending public waste that would otherwise, in the interim, occur while the Commission plans its broader rulemaking on portability and the identical support rule several months from now.<sup>2</sup>

## **I. NTCA'S PROPOSED SAFEGUARDS**

The current rules provide, among other things, that a CETC shall receive support when it “captures” an ILEC’s subscriber lines or serves new subscriber lines in the ILEC’s service area.”<sup>3</sup> The rule, however, does not define what is a “captured” or “new” subscriber line. As a result, it appears that CETCs are reporting loop counts to the Universal Service Administrative Company (USAC) and receiving support for all customers they serve in all study areas where they are designated. Neither the Commission’s rules nor other public information disseminated by USAC provide any guidance that would enable the public or providers to determine whether the federally supported services are already being provided to alleged “new” or “captured” customers. Consequently, CETCs, particularly wireless CETCs who rely on billing addresses to report loop counts, can use this loophole in the rule to collect millions of dollars in duplicative high-cost support and Interstate Common Line Support (ICLS) for customers who have not

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<sup>2</sup> Commissioner Abernathy has indicated that the Commission is planning a rulemaking to focus on the question of whether commercial mobile radio service (CMRS) providers should receive universal service support based on the ILEC’s costs. Commissioner Abernathy has also indicated that it may be several months before the Commission is able to launch the rulemaking proceeding. *Separate Statement of Commissioner Kathleen Q. Abernathy, In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 02j-01, p. 41 (rel. Jul. 10, 2002).

<sup>3</sup> 47 C.F.R. § 54.307(a)[Emphasis added].

disconnected their wireline service and continue to receive the federally supported services from the ILEC or other carriers.

An expedited rulemaking is needed to prevent further erosion of high-cost support funding. Congress and the Commission never intended that multiple carriers each receive support for providing services in rural and high-cost areas to the same customer at the same time.<sup>4</sup> Unfortunately, the Part 54 rules that provide support for “captured” and “new” subscriber are not clear.<sup>5</sup> As a result, support to duplicative CETC lines continue to grow at an alarming pace that cries for a resolution of these issues. There is no accounting to distinguish what CETC lines have been “captured” from other providers. The ambiguity in the term “new” is also creating confusion. In some service area zones, wireless CETC lines exceed the number of lines served by the ILEC and in certain very high cost zones wireless carriers are seeking total annual support far in excess of the support received by the ILEC. It is not apparent that these excessive line counts (which are in fact billing addresses) represent service to customers that do not now or did not previously receive the federally supported services from the ILEC. In Washington State alone, CETCs in the third quarter of 2002 reported more loop counts than ILECs in 11 zones.<sup>6</sup> Furthermore, USAC’s May 2, 2002, filing shows that the annualized projected high cost support to CETCs has grown from \$4.6 million to \$76.4 million between the first quarter of 2001 and

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4 47 C.F.R. § 54.101 lists the supported services for rural and high-cost areas.

5 On February 11, 1999, the Universal Service Administrative Company (USAC) sent a letter to the Commission seeking clarification of these words. USAC requested this clarification so that it could ensure that the distribution of support to CETCs was done efficiently and in compliance with the Act. The Commission, however, has not yet issued a clarification. See, letter sent to Irene Flannery, Chief, Accounting Policy Division, Federal Communications Commission from Robert Haga, Secretary & Treasurer, Universal Service Administrative Company (Attachment A).

6 Attachment B.

third quarter of 2002.<sup>7</sup> The amount of duplicative support to CETCs is growing at a rate that demands immediate action.

NTCA therefore proposes the following definitions and rule to be incorporated into the Commission's existing rules:

#### **47 C.F.R § 54.5 Terms and Definitions.**

**Captured Subscriber Lines.** As used in 47 C.F.R. § 54.307(a), a CETC captures an existing incumbent LEC subscriber line when the incumbent LEC no longer provides the subscriber with the services defined in 47 C.F.R. § 54.101. When a subscriber takes service from a CETC but continues receiving the services defined in 47 C.F.R. § 54.101 from the incumbent LEC, the CETC has not captured the incumbent LEC subscriber's line for purposes of receiving support.

**New Subscriber Lines.** As used in 47 C.F.R. § 54.307(a), service to a new subscriber line means services defined in 47 C.F.R. § 54.101 provided by a CETC to a subscriber that has not previously received 47 C.F.R. § 54.101 services from the incumbent LEC operating in the service area.

**Customer Billing Address.** As used in 47 C.F.R. § 54.307(b), (c) and (d), a customer billing address includes the customer's full name, the customer's complete mailing address used for billing purposes, and the date the customer began receiving service from a CETC or incumbent LEC.

#### **47 C.F.R. § 54.307 Support to a Competitive Eligible Telecommunications Carrier.**

**47 C.F.R. § 54.307(d), *Duplicative Support Prevention.*** In circumstances where the incumbent LEC and one or more CETCs are reporting working loops in the incumbent LEC's service area pursuant to paragraphs (b) and (c), the Administrator, upon the written request of the incumbent LEC, the CETC, or pursuant to its own authority, shall initiate an investigation to determine whether more than one carrier is receiving support for the same subscriber, or subscribers, at the same time. As part of the investigation, the Administrator shall require the incumbent LEC and CETCs to file, under a protective order, a report listing the customer billing address for each working loop reported to the Administrator pursuant to paragraphs (b) and (c). The customer billing address reports shall be filed in alphabetical order by customer last name within 10 business days after issuance of a written request from the Administrator. As part of the investigation, the Administrator will compare the customer names, addresses, and dates of service for each working loop filed by carrier to determine

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<sup>7</sup> Attachment C.



whether support is being distributed to more than one provider for the same customer simultaneously. If the Administrator determines that any CETC-reported working loop does not meet the definition of “captured” or “new,” it shall discontinue support for those CETC working loops and take other appropriate measures to avoid duplication of support.

## **II. EXPLANATION OF THE PROPOSED RULES**

### **A. Definition of “Captured”**

The proposed definition of a “captured” subscriber line will require a CETC to perform due diligence in determining whether the customer is continuing to take wireline rural ILEC service. If a CETC provides service to a customer that has not discontinued all of its services with the rural ILEC, the CETC cannot include that customer in its working loop count filed with USAC. The CETC in this circumstance has not “captured” the customer or taken the customer from the incumbent, but has instead provided the customer with additional or ancillary service. Limiting support to the carrier that first provides service to the customer is administratively feasible and will reduce significantly the amount of duplicative support that is currently being distributed. This approach is also consistent with the primary goal of Section 254 of the Act which is the preservation of universal service.<sup>8</sup> Competition is also advanced since any competitor that “captures” a subscriber will receive support. This proposed definition and its application is also consistent with the Commission’s existing rule 47 C.F.R. § 307(a)(4) which states that a CETC “will receive the full amount of universal service support *previously* provided to such incumbent local exchange carrier for that customer.” [Emphasis added].

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<sup>8</sup> 47 U.S.C. § 254.

**B. Definition of “New”**

The proposed definition of a “new” subscriber line will limit confusion over the distribution of duplicative support because it will clarify the difference between a “captured” and “new” subscriber line in an ILEC service area. A captured subscriber line is a CETC customer previously served by the ILEC that has abandoned all ILEC supported services for substitute CETC supported services. A new subscriber line, conversely, is a CETC customer in the ILEC service area that has not previously taken local exchange service in the ILEC service area. If a CETC provides service to a customer that is not now and has not previously taken service in the ILEC service area, the CETC has obtained a new subscriber line within the ILEC service area and therefore can include this customer in its working loop count filed with USAC. The proposed definition of a new subscriber line clarifies that CETCs may receive support from a brand new customer in the ILEC service territory taking service for the first time.

**C. Definition of “Customer Billing Address”**

The proposed definition of a “customer billing address” will assist USAC in ensuring that only the first carrier to provide service to the customer receives the support when there is more than one eligible carrier providing service to the customer at the same time. If there is a dispute over which carrier provided service first, the date that each carrier began providing service to the customer will determine which carrier receives support. This is also consistent with the Commission’s intent that the eligible carrier that first provides service to the customer should be the only carrier that receives the support for that customer, particularly when another CETC

subsequently provides additional service to the same customer.<sup>9</sup>

#### **D. Procedures To Prevent Duplication Of Support**

The proposed rule, 47 C.F.R. § 54.307(d), will require that USAC implement clear procedures to prevent the duplication of support. Under the above definitions and the rule, USAC will be able to compare customer names, addresses, and dates of service to effectively determine whether a customer is “captured” or “new” and determine whether support is being distributed to more than one provider for the provision of services to the same customer at the same time. If USAC determines there is duplication of support, it can take appropriate action to ensure compliance with the support rules and limit further public waste. The Commission’s current rules state that CETCs shall only receive support for “captured” or “new” lines but the words are meaningless. They simply do not provide USAC with enough clarity to prevent the distribution of duplicative support. In the absence of guidance, it appears that CETCs are receiving support for every reported working loop, a fact acknowledged by USAC.<sup>10</sup> Without the implementation of the proposed definitions and rule, USAC lacks the necessary guidance to prevent future harm to the preservation and maintenance of universal service. The expeditious adoption of NTCA’s proposed safeguards will provide USAC with clear definitions and rules that will help save consumers hundreds of millions in duplicative support pending the Commission’s future proceeding on portability.

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<sup>9</sup> 47 C.F.R. § 54.307(a)(4).

<sup>10</sup> See Attachment A, letter sent to Irene Flannery, Chief, Accounting Policy Division, Federal Communications Commission from Robert Haga, Secretary & Treasurer, Universal Service Administrative Company (Feb. 11, 1999).

### **III. GROUND AND SUPPORT FOR THE EXPEDITIOUS ADOPTION OF NTCA'S PROPOSED SAFEGUARDS**

#### **A. Competitive Neutrality**

The Commission adopted general rules for the distribution of high cost support in 1997. At that time, the Commission decided that CETCs would receive the same per line support as ILECs, based on the ILEC's costs. It concluded that this approach would achieve "competitive neutrality." With the passage of time it has become clear that this approach effectively defeats the Commission's guiding principle of "competitive neutrality." Loopholes in the rules now permit CETCs to receive this support for every working loop they serve in the ILEC service area. Understandably, CETCs have aggressively used the rules to garner support for service to customers who continue to receive the supported services from the ILEC.

The principle of competitive neutrality requires that "universal support mechanisms and rules neither unfairly advantage or disadvantage one provider over another, and neither unfairly favor or disfavor one technology over another."<sup>11</sup> This principle was predicated on the assumption that the public would benefit from fair competition between all types of telecommunications providers.<sup>12</sup> The rules, however, have become the basis for unfair competition in high-cost rural service areas and the critical instrument used by CETCs for gaming universal service support dollars that have no relationship to their cost of providing service. The public is not benefiting from the status quo created by the existing defects in the rules.

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11 *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, First Report and Order, ¶¶ 47-50 (rel. May 8, 1997).

12 The identical support rule was adopted under this same assumption. See, *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, First Report and Order, ¶¶ 286-290 (rel. May 8,

## **B. Unfair Competitive Advantage**

Wireless CETCs are exempt from rate and state entry regulation; this allows them to avoid the substantial costs associated with carrier-of-last-resort obligations, service quality requirements, cost-studies, rate cases, accounting obligations, separations requirements, audit reviews, and other state and federal regulatory mandates.<sup>13</sup> As Commissioner Abernathy acknowledges:

Requiring incumbent LECs, but no one else, to comply with costly regulations and to open their books to competitors raises obvious questions of competitive neutrality.<sup>14</sup>

This regulatory disparity coupled with application of the identical support rule and ambiguity about the meaning of “captured” and “new” customers provide a regulatory recipe that is an artificial inducement for competition that unjustifiably favors wireless carriers. Indeed, the current rules create an insidious incentive for wireless carriers to seek CETC status in high-cost areas where they already provide ancillary wireless service to ILEC customers. These carriers have every incentive to seek CETC status because they can obtain high-cost support for existing ILEC subscribers without ever verifying whether their customers have actually discontinued

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1997).

13 Wireless CETCs neither provide the same quality of local service or interstate access services to consumers. They do not use the same type of facilities to provide the services or incur the same costs for providing the services as rural ILECs. Wireless CETCs do not have high-cost loops and do not provide ubiquitous local service. They also do not have the interstate access costs relevant to the ICLS mechanism because they have no wireline local loops on which the ICLS mechanism is based. And, unlike rural ILECs, wireless CETCs do not offer equal access to all long distance carriers and hence wireless CETC costs for providing access to a single long distance carrier are likely substantially lower than the rural ILEC’s costs.

14 Separate Statement of Commission Kathleen Q. Abernathy, Report and Order in CC Docket Nos. 00-199, 97-212, and 80-286, Further Notice of Proposed Rulemaking in CC Docket Nos. 00-199, 99-301, and 80-286, FCC 01-305, In the Matter of 2000 Biennial Regulatory Review – Comprehensive Review of Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, Amendments to the Uniform System of Accounts for Interconnection, Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Local Competition and Broadband Reporting, p. 2 (rel. November 5, 2001).

their longstanding ILEC service. The rules simply allow mobile CETCs to file working loop counts with USAC to receive support regardless of whether the working loops are already reported to USAC by the ILEC. There is no requirement that the customer addresses which are used by mobile CETCs to identify service locations, match names or involve service in the ILEC's service area. The opportunity to gain access to high-cost support is therefore irresistible. When a wireless CETC receives duplicative universal service support under these circumstances it is a pure windfall.<sup>15</sup>

### **C. Duplication of Support**

Duplicative support based on confusing rules and ILEC costs is harmful to the public. As Commissioner Martin previously warned:

I am hesitant to subsidize multiple competitors to serve areas in which the costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area leading to inefficient and/or stranded investment and a ballooning universal service fund.”<sup>16</sup>

Distributing duplicative support to CETCs that provide additional voice service to existing rural ILEC voice customers is leading to the rapid ballooning of the universal service fund and can be expected to result in the eventual degradation of service quality in low-density, high-cost rural study areas. Duplicative support is an accident that has no role in the maintenance or advancement of universal service in high cost areas. The Commission needs to define terms and

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<sup>15</sup> *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 412 (U.S.C.A. 5<sup>th</sup> Cir. 1999) (“Excessive funding may itself violate the sufficiency of the Act”).

<sup>16</sup> *In the Matter of the Multi-Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers* CC Docket 00-256, *Federal-State Joint Board on Universal service* CC Docket 96-45, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate of Return Regulation* CC Docket No. 98-77, and *Prescribing the Authorized Rate of Return for Interstate Services for Local Exchange Carriers* CC 98-166, FCC 01-304, ¶142 (rel. November 8, 2001) (*MAG Order*), *Separate Statement of*

clarify its rules to prevent the harm that this accident is causing.

Commissioner Martin's fears are coming to pass. A recent analysis by McLean & Brown shows duplicative support payments to CETCs has grown dramatically.<sup>17</sup> Annual projected CETC support payments in the first quarter of 2002 totaled \$15.3 million. By the second quarter of 2002, support payments to CETCs more than tripled to \$47.9 million. And by the third quarter of 2002, CETC support reached an alarming \$76.4 million. This rapid growth in duplicative CETC support shows no signs of slowing down. Of the top 20 CETC recipients, 75 percent are wireless carriers, and 15 of the top 20 received their first payments from the universal service fund in the third quarter of 2002.<sup>18</sup> Many more CETCs are expected to apply for the support over the next few months, particularly given the fact that they are neither required to demonstrate their costs nor required to demonstrate that their customers no longer receive supported services from wireline ILECs.

#### **D. Changed Circumstances**

In 1997, when the Commission adopted the identical support rule, its goal was to minimize disparities so that "no entity receives an unfair competitive advantage that may skew the marketplace."<sup>19</sup> The Commission believed that restrictions in the rule would prevent economic distortions and gaming. Unfortunately, just the opposite has resulted from the application of the rule. CETCs with no loop costs and no lines *per se* have been able to receive the same per line support as the rural ILEC that have enormously expensive 10, 15, 30, 40 or 50

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*Commissioner Kevin J. Martin. (MAG Order), Separate Statement of Commissioner Kevin J. Martin.*

<sup>17</sup> USF Portability – Getting it Right, McLean & Brown, Issue Update, Special Edition, p. 3, (June 25, 2002).

<sup>18</sup> *Id.*

<sup>19</sup> *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8801-8802, ¶ 48.

mile loops merely by filing a report listing a total number of working loops that consists of no more than their total number of customers in the service area, regardless of whether these customers continue to receive service from the rural ILEC.

The 1997 assumptions underlying the rule have also proven false over the course of the last five years. For example, the Commission concluded that a CETC could not unfairly compete in an ILEC's service area if it had lower costs because the CETC is required to provide and advertise its "service throughout the entire service area, consistent with Section 214 (e)..."<sup>20</sup>

As a result of subsequent state and Commission actions, however, the Commission has concurred with states in all cases where they sought to redefine service areas and reduce CETC obligations to serve "throughout the entire rural ILEC service area." In many instances, wireless CETCs are in fact not required to provide service throughout the entire rural ILEC service area.<sup>21</sup>

Indeed, in South Dakota it is not even necessary for a CETC to serve a single customer before

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20 *Id.*, p. 8933, ¶289. 47 USC § 214(e)(2) also requires that before "designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." [Emphasis added].

21 See, *In the Matter of the Federal-State Joint Board on Universal Service, Petition for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket 94-65, FCC 01-311, (Oct. 19, 2001); *In the Matter of the Federal-State Joint Board on Universal Service, Petition for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of South Dakota*, Declaratory Ruling, CC Docket 94-65, FCC 00-248 (Aug. 10, 2000); *In the Matter of Western Wireless Corporation's Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, FCC 00-309 (Aug. 28, 2000); *In the Matter of the Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285 (Oct. 27, 1999); *In the Matter of the Application of GCC License Corporation Seeking Designation as an Eligible Telecommunications Carrier in the State of Nebraska*, Application No. C-1889 (Nov. 21, 2000); *In the Matter of the Application of GCC License Corporation Seeking Designation as an Eligible Telecommunications Carrier in the State of Oklahoma*, Order No. 450765 (Nov. 21, 2000); *In the Matter of the Application Western Wireless Corporation Seeking Designation as an Eligible Telecommunications Carrier in the State of Texas*, PUC Docket No. 22289 (Oct. 30, 2000); *In the Matter of the Application of United States Cellular Seeking Designation as an Eligible Telecommunications Carrier in the State of Washington*, Docket No. UT-970345 (Dec. 30, 1999), and *In the Matter of the Application of United States Cellular Seeking Designation as an Eligible Telecommunications Carrier in the State of Iowa*, Docket No. 199IAC39.2(4) (January 15, 2002).



becoming certified under Section 214(e), and the Commission's current rules permit CETCs to file loop counts regardless of whether they have loops and whether they offer service to the one most profitable customer or all customers.<sup>22</sup> Wireless CETCs have applied for and received designations to provide service in entire states, boundaries which have no reference to their ability to comply with Section 214(e)(1), (2) and (5) of the Act.

#### **E. Gaming Opportunities**

Commission rules provide that mobile wireless carriers may use customer "billing addresses" to identify the service location of their mobile customer. 47 C.F.R. § 54.307(b). This allows mobile wireless providers to receive the same per line support as the incumbent for any wireless customer who chooses a billing address in a high cost area. This linking of support to the billing address is also problematic because there is no necessary relationship between the wireless subscriber high-cost area billing address of choice and the area where the customer uses the service. The rule therefore creates innumerable opportunities for wireless CETCs to game universal service support to gain an unfair competitive advantage.

Because high-cost support and ICLS is simply there for the taking, CETCs are applying for ETC designation so they can take advantage of the availability of the duplicative support dollars. Under these circumstances, support creates an obvious automatic competitive advantage. Indeed, some have opined that companies faced with this type of opportunity may be acting under a perceived duty to pursue ETC status. Even if the management of competing companies know that their costs are low enough to compete effectively without the additional

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<sup>22</sup> See, *In Re Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, 2001 SD 32, (South Dakota Supreme Court March 14, 2001).

support, they may feel compelled by their fiduciary duty to seek support so as to maximize profits and avoid lost opportunities to obtain support. Congress did not intend that support mechanisms operate this way. The public benefits when a carrier can enter a market and provide an equivalent level of service at a lower price. But when lower prices come as a result of a rule that allows CETCs to receive above-cost support for already served or phantom customers, the public ultimately suffers through poorer service and higher universal service payments.

#### **F. Disincentives to Investment in Rural Areas**

The harmful effects of the lack of definition of “captured” and “new” lines has also added to the growing level of investment uncertainty in rural communities and in the United States as a whole. As Commissioner Copps fittingly points out:

It is essential, that any regime we adopt increase certainty so that rural carriers can plan for the future and undertake necessary investment to modernize the telecommunications infrastructure in their communities.<sup>23</sup>

Regrettably, because of the loopholes in the rules, rural ILECs, as part of their overall investment strategy, must now consider whether to limit their investments because they know the more they invest to maintain and upgrade their networks the more attractive high-cost support and ICLS becomes to unregulated CETCs considering entry into their markets. The available high-cost support and ICLS, is a windfall for many unregulated CETCs who do not have to show their costs nor that support is advancing universal service in any way.

#### **IV. CONCLUSION**

The failure to define essential terms in current rules have resulted in: (1) the public waste of tens of millions of dollars in the form of duplicative universal service support to unregulated

CETCs over the first three quarters of 2002, (2) windfalls of millions of high-cost support dollars to CETCs who have neither demonstrated their costs nor justified their need for support, (3) increased investment uncertainty for rural ILECs; (4) the uncontrolled ballooning of the high-cost support and ICLS funds; and (5) an environment in which carriers are deciding to compete in rural ILEC service areas on the basis of duplicative support instead of market factors.

The Commission should therefore open an immediate rulemaking to adopt and incorporate NTCA's proposed definitions and rule. The implementation of these safeguards should take place before the Commission conducts its general proceeding into "portability" later this year or next year. The adoption of the proposed definitions and rule will save consumers hundreds of millions of dollars over the next several quarters and will reduce projected carrier universal service contribution obligations at the same time.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS  
COOPERATIVE ASSOCIATION

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23 *MAG Order, Dissenting Statement of Commissioner Michael J. Copps.*

## CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing “Petition For Expedited Rulemaking” of the National Telecommunications Cooperative Association was served on this 26<sup>th</sup> day of July 2002 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/Rita H. Bolden

Rita H. Bolden

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